

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33042

PAMELA LEE BARZALY  
f/d/b/a EMOTION ALLEY

Debtor

ANN MOSTOLLER, CHAPTER 7 TRUSTEE

Plaintiff

v.

Adv. Proc. No. 02-3197

WENDY STRELITZ, WELLS FARGO BANK  
MINNESOTA, NATIONAL ASSOCIATION,  
as Trustee, ALBERT P. OCUTO,  
GLORIA A. OCUTO, and  
PAMELA LEE BARZALY

Defendants

**MEMORANDUM ON  
MOTIONS FOR SUMMARY JUDGMENT**

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**RICHARD STAIR, JR.**

**UNITED STATES BANKRUPTCY JUDGE**

The Plaintiff, Ann Mostoller, Trustee, filed the Complaint initiating this adversary proceeding on December 12, 2002, seeking (1) to determine the validity of liens, (2) to recover funds paid to the Defendant, Wells Fargo Bank Minnesota, National Association (Wells Fargo), and (3) a declaratory judgment regarding the validity of a release recorded post-petition. On January 13, 2003, the Defendants, Albert P. Ocuto and Gloria A. Ocuto (the Ocutos), filed an Answer and Counterclaim, denying the Trustee's allegations and by way of a counterclaim, seeking an order compelling the Trustee to release a Deed of Trust encumbering the real property that is the subject of the Trustee's action. The Trustee filed her Answer to Counterclaim of Defendants Albert P. Ocuto and Gloria A. Ocuto on January 24, 2003, denying that she is required to file and pay the costs of recording any release. Wells Fargo filed its Answer to the Complaint on April 14, 2003, also denying the Trustee's allegations.

On April 24, 2003, the court held a scheduling conference and the Trustee orally requested leave to amend the Complaint, which was granted by Order entered April 25, 2003. The Trustee thereafter filed an Amended Complaint on May 12, 2003, expanding her claims to include avoidance of a preferential and/or fraudulent transfer between the Debtor and the Defendant, Wendy Strelitz, pursuant to 11 U.S.C.A. § 547 (West 1993 & Supp. 2003) and/or 11 U.S.C.A. § 548 (West 1993 & Supp. 2003). The Ocutos filed their Answer and Counterclaim to the Amended Complaint on May 15, 2003, again making the same denials and counterclaim, and on June 20, 2003, Wells Fargo filed its Answer to the Amended Complaint.<sup>1</sup>

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<sup>1</sup> These issues for trial are specifically set forth in the Pretrial Order entered on December 5, 2003.

On December 2, 2003, the Trustee filed an Application for Judgment by Default against the Debtor and the Defendant, Wendy Strelitz (Ms. Strelitz), for failure to answer the Complaint and Amended Complaint. An evidentiary hearing on all issues, including the Application for Judgment by Default, is scheduled for February 9, 2004.

Presently before the court are the following, all filed on December 16, 2003: (1) a Motion for Summary Judgment by Wells Fargo Bank, Minnesota, filed by the Defendant Wells Fargo (the Wells Fargo Motion); (2) a Motion for Summary Judgment filed by the Plaintiff Trustee (the Trustee's Motion); and (3) a Motion for Summary Judgment filed by the Defendants Albert P. Ocuto and Gloria A. Ocuto (the Ocuto Motion). The Motions are supported by memoranda of law, as required by E.D. Tenn. LBR 7007-1, as well as exhibits and deposition testimony. The issues raised by the three Motions are virtually identical.<sup>2</sup> This Memorandum will, however, address these issues solely within the context of the exhibits filed in support of the Trustee's Motion.<sup>3</sup>

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (E), (H), (K), and (O) (West 1993).

## I

The following facts are not in dispute. In 1999, the Debtor owned real property located at 524 Asa Street, Sevierville, Tennessee (the Real Property). On January 12, 1999, the Debtor executed a

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<sup>2</sup> See *infra* n.6.

<sup>3</sup> All relevant exhibits are filed as an appendix to the Memorandum in Support of Motion for Summary Judgment filed by the Trustee on December 16, 2003. The exhibits are numbered 1 through 13.

General Warranty Deed, conveying the Real Property to Ms. Strelitz, which was recorded with the Sevier County Register of Deeds on January 12, 1999. *See* Ex. 3. In connection with this conveyance, Ms. Strelitz executed a Deed of Trust to Timothy W. Jones, Trustee, for the benefit of the Debtor. The Deed of Trust recites that it secures a \$200,000.00 promissory note made by Ms. Strelitz to the Debtor (the Barzaly Deed of Trust).<sup>4</sup> Ex. 4. Although she executed the Barzaly Deed of Trust on January 12, 1999, it was not recorded with the Sevier County Register of Deeds until June 28, 2000. Nevertheless, there is no dispute that, at the time it was recorded, the Barzaly Deed of Trust created a first mortgage lien against the Real Property.

On November 3, 2000, the Debtor executed a Release of the Barzaly Deed of Trust (the November 2000 Release), which states, in part, that “for a valuable consideration in hand paid, the receipt and sufficiency of which is hereby acknowledged, do hereby acknowledge satisfaction thereof in full and do hereby release the lien of said Deed of Trust IN FULL.” Ex. 5. The November 2000 Release was not recorded with the Sevier County Register of Deeds.

On November 6, 2000, Ms. Strelitz executed a Deed of Trust in favor of New Century Mortgage Corporation, pledging the Real Property as security for a loan in the amount of \$238,000.00 (the New Century Deed of Trust). Ex. 6. The New Century Deed of Trust, which was recorded with the Sevier County Register of Deeds on November 16, 2000, was subsequently assigned to the Defendant, Wells Fargo. Wells Fargo avers that New Century Mortgage reasonably relied upon the November 2000

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<sup>4</sup> A copy of this \$200,000.00 promissory note is not a part of the present record.

Release in making the New Century Deed of Trust and advancing the funds to Ms. Strelitz, believing that it would hold a first mortgage on the Real Property.

The Debtor filed the Voluntary Petition commencing her Chapter 7 bankruptcy case on June 19, 2001, and the Plaintiff was duly appointed trustee. In the performance of her duties in administering the Debtor's bankruptcy estate, the Trustee initiated foreclosure proceedings against the Real Property, pursuant to the Barzaly Deed of Trust. To effectuate the foreclosure, she appointed a successor trustee under the Barzaly Deed of Trust through the execution and recording of an Appointment of Successor Trustee on January 15, 2002. Ex. 7. Thereafter, a foreclosure sale of the Real Property was noticed for April 5, 2002. *See* Ex. 8.

On March 6, 2002, counsel for the Trustee received a facsimile transmission from Ms. Strelitz, which states, in material part:

Please be advised that the house at 524 Asa Street, Sevierville, Tennessee 37876 was sold on January 14, 2002. The mortgage company Guarantee Land Title in Sevierville would not release the mortgage until my mortgage with Pamela Barzaly was released. Please be advised that I was released from this mortgage and Guarantee Land Title have [sic] the paperwork reflecting such a release.

The house in Sevierville was sold for \$280000.00 [sic] and the monies received after all deductions was \$2900.

Ex. 9. The Trustee then discovered that on January 12, 2002, Ms. Strelitz executed a General Warranty Deed, conveying the Real Property to the Defendants, Albert P. Ocuto and Gloria A. Ocuto, which was recorded with the Sevier County Register of Deeds on January 16, 2002. Ex. 10.

The Trustee also discovered that on January 14, 2002, Wells Fargo had recorded an Appointment of Successor Trustee executed on December 4, 2001, in connection with foreclosure proceedings it initiated pursuant to the New Century Deed of Trust. Ex. 11. As a result of the sale of the Real Property to the Ocutos, the New Century Deed of Trust was fully satisfied from the proceeds.<sup>5</sup> The Debtor did not receive any portion of the proceeds of the sale.

On April 16, 2002, the Trustee sent a letter to the parties advising that she had succeeded to the Debtor's rights and interests as a result of the bankruptcy filing. Ex. 12. Because a release of the Barzaly Deed of Trust had never been recorded with the Sevier County Register of Deeds, the Trustee took the position that it was still a first mortgage on the Real Property, and she was thus (1) asserting a claim against the proceeds of the sale of the Real Property received by Wells Fargo, and (2) considering continuation of the foreclosure proceeding against the Real Property. The Trustee also notified the parties that she was not seeking to recover the entire \$200,000.00 due under the Barzaly Deed of Trust, as a \$65,000.00 payment thereunder would allow unsecured creditors to receive a 100% distribution.

Thereafter, on April 23, 2002, a Release executed by the Debtor dated January 5, 1999, was recorded with the Sevier County Register of Deeds (the Recorded Release). Ex. 13. While this Release bears the January 5, 1999 date, the notary acknowledgment evidences that it was, in actuality, executed

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<sup>5</sup> The record presently before the court does not include evidence of the release of the New Century Deed of Trust. However, in the Memorandum in Support of Motion for Summary Judgment by Wells Fargo Bank, Minnesota filed on December 16, 2003, counsel for Wells Fargo, in discussing the sale of the Real Property by Ms. Strelitz to the Ocutos, states that the "Wells Fargo loan [was] paid in full."

on April 10, 2002. For this, and for other reasons hereinafter discussed, the court concludes that this Release is invalid and ineffective to defeat the rights of the Trustee.

## II

Rule 56 of the Federal Rules of Civil Procedure allows summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c) (applicable to adversary proceedings under Federal Rule of Bankruptcy Procedure 7056).

When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter, but instead, simply determines whether a genuine issue for trial exists. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact, thus entitling it to judgment as a matter of law. *Owens Corning v. Nat’l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6<sup>th</sup> Cir. 2001). The burden then shifts to the nonmoving party to produce specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citing FED. R. CIV. P. 56(e)). The nonmoving party must cite specific evidence and may not merely rely upon allegations contained in the pleadings. *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6<sup>th</sup> Cir. 2000). The facts and all resulting inferences are viewed in a light most favorable to the non-moving party, *Matsushita*, 106 S. Ct. at 1356, whereby the court will decide whether “the evidence presents a sufficient disagreement to require submission to a



jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 106 S. Ct. at 2512. “[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, 106 S. Ct. at 2510.

### III

By the Trustee’s Motion, the Trustee requests summary judgment that: (1) the Barzaly Deed of Trust remains an outstanding indebtedness that became an asset of the Debtor’s bankruptcy estate and remains an enforceable lien against the Real Property such that the Trustee may foreclose upon the Real Property and apply any proceeds to the benefit of the estate; (2) the November 2000 and January 1999 Releases executed by the Debtor are ineffective and invalid to release the Barzaly Deed of Trust; (3) the Ocutos purchased the Real Property subject to the Barzaly Deed of Trust; and (4) the Trustee is entitled to the turnover from Wells Fargo of the proceeds received after the post-petition conveyance of the Real Property from Ms. Strelitz to the Ocutos.<sup>6</sup>

The gist of the Trustee’s argument focuses on whether the Debtor held an enforceable lien, pursuant to the Barzaly Deed of Trust, on the Real Property at the time her bankruptcy case commenced. At the

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<sup>6</sup> The Wells Fargo Motion seeks summary judgment that (1) any transactions involving Wells Fargo did not involve the Debtor; (2) the extent and validity of any lien of the Debtor’s that existed at the time of the bankruptcy filing remained, and the Trustee succeeded to any such interest; and (3) the Trustee was not entitled to turnover of the funds paid to Wells Fargo in satisfaction of its second mortgage on the Real Property.

The Ocuto Motion seeks summary judgment that (1) the Barzaly Deed of Trust was not a valid lien on the Real Property because it had been either released or satisfied; (2) the Trustee may not avoid either the November 2000 Release or the Recorded Release under § 548; and (3) the Releases may not be avoided under § 547. Additionally, the Ocutos seek the preparation and recording of a release by the Trustee of the Barzaly Deed of Trust to clear up any cloud on the chain of title for the Real Property.

commencement of a debtor's bankruptcy case, an estate is created, which includes all of a debtor's property. 11 U.S.C.A. § 541(a) (West 1993). A Chapter 7 trustee, who becomes the representative of the bankruptcy estate, succeeds to all of the debtor's interests in property of the estate and inherits the responsibility to use estate property in the best interests of creditors, including the collection of, reduction to money of, and accountability for the estate property. *See* 11 U.S.C.A. § 323(a) (West 1993); 11 U.S.C.A. § 704(1), (2) (West 1993). The rights and powers acquired by the trustee are vested through federal bankruptcy law but are determined by application of state law, which, in this case, is Tennessee property law. *See Waldschmidt v. Dennis (In re Muller)*, 185 B.R. 552, 554 (Bankr. M.D. Tenn. 1995).

Tennessee Code Annotated section 66-24-101 sets forth the writings and documents eligible for recording and includes the following:

(1) All agreements and bonds for the conveyance of real or personal estate;

....

(8) All mortgages and deeds of trust of either real or personal property;

....

(9) The acknowledgment of satisfaction and discharge of mortgage, trust, and other liens, by an entry in the margin of the record thereof[.]

TENN. CODE ANN. § 66-24-101 (1993 & Supp. 2003). With regards to releases of mortgages and/or deeds of trust, Tennessee Code Annotated also provides that:

(a) When a debt secured by a mortgage, deed of trust, or by lien retained in a deed of conveyance of land or bill of sale, or other instrument, has been fully paid or satisfied, the mortgagee, transferee, or assignee of the mortgagee or the legal holder of the debt secured by deed of trust or lien, who has received payment or satisfaction of the debt, must satisfy the record by a formal deed of release.

(b) In any county having a population of not less than thirty-two thousand six hundred (32,600) nor more than thirty-two thousand seven hundred (32,700) according to the 1980 federal census or any subsequent federal census the record may be satisfied by entry on the margin of the record of the mortgage, deed of trust, deed or other instrument.

TENN. CODE ANN. § 66-25-101 (1993). Reading these two statutes together, it is apparent that when an obligation secured by a recorded deed of trust has been satisfied, a release thereof must also be recorded to complete the chain of title and document the record. This is important because of a third statute, section 66-26-101, which states that:

All of the instruments mentioned in § 66-24-101 shall have effect between the parties to the same, and their heirs and representatives, without registration; but as to other persons, not having actual notice of them, only from the noting thereof for registration on the books of the register, unless otherwise expressly provided.

TENN. CODE ANN. § 66-26-101 (1993). Finally, section 66-26-103, entitled “Unregistered instruments void as to creditors and bona fide purchasers” provides that:

Any of such instruments not so proved, or acknowledged and registered, or noted for registration, shall be null and void as to existing or subsequent creditors of, or bona fide purchasers from, the makers without notice.

TENN. CODE ANN. § 66-26-103 (1993).

Under Tennessee law, “whatever is sufficient to put a person upon inquiry, *is notice of all the facts to which that inquiry will lead*, when prosecuted with reasonable diligence and in good faith.” *Texas Co. v. Aycock*, 227 S.W.2d 41, 46 (Tenn. 1950) (quoting *Covington v. Anderson*, 84 Tenn. 310, 319 (Tenn. 1886)). “A legally registered [document] places subsequent creditors and purchasers on constructive notice.” *Limor v. Fleet Mortgage Group (In re Marsh)*, 12 S.W.3d 449, 454 (Tenn. 2000). In essence, the totality of these statutes and case law results in the rule of law that, in Tennessee,

a valid but unrecorded document of the kind specified in section 66-24-101 is effective between the parties thereto, but it is not effective as to third parties, whether creditors or bona fide purchasers, without notice of the unrecorded document. *Newton v. Herskowitz (In re Gatlinburg Motel Enters., Ltd.)*, 119 B.R. 955, 964 (Bankr. E.D. Tenn. 1990).

The Debtor filed her bankruptcy case on June 19, 2001. As of that date, there were three documents of record with the Sevier County Register of Deeds regarding the Real Property and these parties: (1) a Warranty Deed executed on January 12, 1999, conveying the Real Property from the Debtor to Ms. Strelitz; (2) the Barzaly Deed of Trust, executed on January 12, 1999, and recorded on June 28, 2000; and (3) the New Century Deed of Trust, executed on November 6, 2000, and recorded on November 16, 2000. Since no release of the Barzaly Deed of Trust had been recorded as of June 19, 2001, the Barzaly Deed of Trust, at the very least, to all third parties without notice, constituted a lien against the Real Property, securing any right to payment still held by the Debtor. By virtue of the bankruptcy filing, the Trustee succeeded to that right and to the Debtor's interest under the Barzaly Deed of Trust.

Two releases of the Barzaly Deed of Trust have surfaced in connection with the prosecution of this adversary proceeding. The Recorded Release, purportedly dated January 5, 1999, was recorded on April 23, 2002. This Release is invalid on its face and is ineffective as to the Trustee. The Recorded Release states, in material part:

Pamela Barzaly is the true and lawful owner and holder, of a claim secured by a Deed of Trust executed by Wendy Strelitz of record in Trust Book 1081, Page 117, in the Register's Office of Sevier County, Tennessee, to which reference is here made, and for

a valuable consideration, in hand paid, do hereby acknowledge satisfaction thereof and do hereby release the lien of said instrument.

Ex. 13. The Debtor signed and dated the Release January 5, 1999, seven days before the Barzaly Deed of Trust was even executed and seventeen months before the Barzaly Deed of Trust was recorded with the Register of Deeds. Clearly, the Debtor could not have known in January 1999 the book and page number of a deed of trust that had not yet been recorded and would not be recorded for more than a year. Additionally, the document was notarized on April 10, 2002, evidencing to the court that the Recorded Release was actually executed on April 10, 2002, and not January 5, 1999. Because the document is invalid on its face, it cannot serve as a valid release of the Barzaly Deed of Trust.<sup>7</sup>

With respect to the validity of the November 2000 Release, the Trustee argues that it was invalid because it was given without consideration. The Trustee also argues that even if the November 2000 Release had been valid between the parties, she can use her “strong-arm” powers to avoid it and step in the place of a bona fide purchaser or creditor pursuant to 11 U.S.C.A. § 544(a) (West 1993).<sup>8</sup>

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<sup>7</sup> The Trustee seeks to avoid this Release pursuant to 11 U.S.C.A. § 549(a)(1) (West 1993) which provides in material part that “the trustee may avoid a transfer of property of the estate— (1) that occurs after the commencement of the case.” Here, § 549(a)(1) does not come into play because the Recorded Release is invalid.

<sup>8</sup> Section 544(a), which confers upon a trustee the “strong-arm” powers, provides as follows:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor

(continued...)

The Trustee has introduced proof, in the form of deposition testimony, that Ms. Strelitz did not actually pay any money to the Debtor towards satisfaction of the Barzaly Deed of Trust. *See* Ex. 1 (Dep. of the Debtor); Ex. 2 (Dep. of Ms. Strelitz). In response, the Ocutos introduced testimony that the Debtor received consideration for the Release in the form of funds contributed to joint business and living expenses. It is, however, inconsequential to the Trustee's Motion whether the November 2000 Release was valid and binding between the Debtor and Ms. Strelitz. The issue is whether it was binding on third parties without notice. It was not.

When a release of a deed of trust has not been recorded, and the holder of the deed of trust files for bankruptcy, the debtor's bankruptcy estate maintains a valid and properly perfected interest in the real property, which may be administered by the Chapter 7 trustee, as "successor-in-interest" to the debtor's property and interests therein. In other words, in order for a release of a recorded deed of trust to be binding upon third parties without notice, such as a Chapter 7 trustee, it must be included in the chain of title by recording with the register of deeds.<sup>9</sup> The November 2000 Release has never been recorded with

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<sup>8</sup>(...continued)

that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C.A. § 544(a). "The status which [§ 544(a)] confers upon the trustee in bankruptcy is that of 'the ideal creditor, irreproachable and without notice, armed cap-a-pie with every right and power which is conferred by the law of the state upon its most favored creditor who has acquired a lien by legal or equitable proceedings.'" *Lancaster v. Hurst (In re Hurst)*, 27 B.R. 740, 742 (Bankr. E.D. Tenn. 1983) (quoting *In re Waynesboro Motor Co.*, 60 F.2d 668, 669 (S.D. Miss. 1932)).

<sup>9</sup> In fact, under Tennessee law, the holder of a debt secured by real property who fails to "enter a proper release of record" after satisfaction of the debt within 45 days from the receipt of a written request from the party making the  
(continued...)

the Sevier County Register of Deeds, and it is not binding upon the Trustee under her § 544(a) “strong-arm” avoidance powers.

Along those lines, because the Barzaly Deed of Trust was not released as to third parties without notice, and the Trustee succeeded to the lien on the Real Property held by the Debtor at the commencement of her bankruptcy case, the lien still attached to the Real Property on January 12, 2002, when the Ocutos purchased the Real Property. The Trustee, therefore, retains the rights and interests granted her by the Barzaly Deed of Trust, including the option to foreclose, assuming all or a portion of the indebtedness secured by the Barzaly Deed of Trust has not, in fact, been satisfied.<sup>10</sup>

#### IV

The finding by the court that a lien remains on the Real Property pursuant to the Barzaly Deed of Trust does not, however, answer the question of whether there was ever actually an indebtedness secured by the Barzaly Deed of Trust, and if so, whether the indebtedness has been satisfied or if it remains an asset of the Debtor’s bankruptcy estate.

The Ocutos introduced evidence, in the form of deposition testimony, that the January 1999 transfer of the Real Property between the Debtor and Ms. Strelitz was never intended to represent an actual sale

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<sup>9</sup>(...continued)

payment “shall forfeit to the party making such request the sum of one hundred dollars (\$100). TENN. CODE ANN. § 66-25-102 (Supp. 2003).

<sup>10</sup> Additionally, because the November 2000 Release was never recorded and is not binding on third parties, it is not necessary for it to be avoided by the Trustee under either § 547(b) as a preferential transfer or § 548 as a fraudulent transfer. Therefore, the court need not address whether the requirements for either were met.

of the Real Property, but instead, was merely an attempt to transfer assets out of the Debtor's name so that her ex-spouse could not reach them. As such, the transaction was structured as a sale, but it was intended by the parties to effectuate a gift. According to this proof, while Ms. Strelitz wanted to pay the Debtor \$200,000.00, she intended to pay the money only if she absolutely could afford to.

In the alternative, the Ocutos argue that any indebtedness secured by the Barzaly Deed of Trust was satisfied by the Debtor's use of the loan proceeds obtained by Ms. Strelitz. In April 1999, Ms. Strelitz and the Debtor opened a card and gift shop called Emotion Alley, in which each was a 50% owner. As operating capital for Emotion Alley, Ms. Strelitz obtained a \$100,000.00 line of credit with BankFirst, secured by a deed of trust on the Real Property. In June 2000, the business was failing, and Ms. Strelitz obtained a loan from Union Planters Bank in the amount of \$150,000.00, secured by a deed of trust on the Real Property. This loan paid off the BankFirst loan, with the remainder used by the Debtor and Ms. Strelitz to pay living expenses and the Debtor's legal expenses stemming from her divorce. Ms. Strelitz then obtained the \$238,000.00 loan from New Century Mortgage to pay off the Union Planters loan, as well as to again provide money for their respective families and to pay the Debtor's legal expenses. Because portions of these loans were used to pay living expenses for the Debtor and her children, as well as to pay the Debtor's legal expenses, the Ocutos argue that any indebtedness owed by Ms. Strelitz was satisfied.

In response to the arguments set forth by the Ocutos, the Trustee first argues that the deposition testimony as to the intentions of Ms. Strelitz and the Debtor cannot be considered, as it is inadmissible parol evidence. Notwithstanding her parol evidence argument, the Trustee also argues that the deposition



testimony relied upon by the Ocutos actually evidences that the Debtor and Ms. Strelitz knew that the transaction was “legal” and would have to be “honored” by them. She asserts that the deposition testimony instead evidences that the Debtor intended to convey the Real Property to Ms. Strelitz, and that Ms. Strelitz intended and fully expected to pay the Debtor. The Ocutos oppose the Trustee’s argument, insisting that parol evidence is admissible to show actual consideration for a contract, the failure to pay consideration recited in a contract, or the existence of subsequent or collateral agreements. The court agrees with the Ocutos.<sup>11</sup> At any rate, material issues of fact exist regarding the satisfaction of all or any portion of Ms. Strelitz’s obligation to Ms. Barzaly that was secured by the Barzaly Deed of Trust.

Finally, the Trustee argues that the deposition testimony reflects that the Barzaly Deed of Trust has not been repaid by Ms. Strelitz, despite the fact that portions of the proceeds of other loans paid joint business debts and joint living expenses. She maintains that there is no evidence that the payment of these expenses was intended to extinguish the mortgage debt secured by the Barzaly Deed of Trust. Again, this issue raises material issues of fact.

Based upon the evidence presented, sufficient questions of material fact exist concerning the issues of whether the Barzaly Deed of Trust ever secured an actual indebtedness, and if so, whether all or a portion of that indebtedness has already been satisfied. If an indebtedness remains, it is an asset of the Debtor’s bankruptcy estate, and pursuant to the lien provided by the Barzaly Deed of Trust, the Trustee

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<sup>11</sup> The Trustee’s reliance on the parol evidence rule is misplaced, as third parties are not “precluded from proving the truth about a document however the truth may vary from the statements contained in said document.” *Nashville Interurban Ry. v. Gregory*, 193 S.W. 1053, 1057 (Tenn. 1916); *see also Crouch v. Crouch*, No. 03A01-9312-CH-00457, 1994 Tenn. App. LEXIS 761, at \*5 (Tenn. Ct. App. Dec. 21, 1994) (“[T]he parol evidence rule does not apply to third parties, but only parties to the contract and their privies.”).

may execute upon the Real Property to recover the amount thereof. On the other hand, if the court finds that there is no remaining indebtedness, the Trustee is required, under Tennessee Code Annotated section 66-25-101, to execute and record a release of the Barzaly Deed of Trust. Summary judgment may not be granted as to these issues, and therefore, the Ocutos and Ms. Strelitz must remain defendants to this lawsuit.

## V

The Trustee also requests turnover from Wells Fargo of the proceeds received after the post-petition conveyance of the Real Property from Ms. Strelitz to the Ocutos. More specifically, § 541, concerning property and interests of a debtor that become property of the estate and subject to administration by the Chapter 7 trustee, provides in material part:

(a) The commencement of a case under section 301 . . . of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as [otherwise] provided . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

. . . .

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, . . . becomes property of the estate under subsection (a)(1) . . . of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C.A. § 541 (West 1993). All property of the bankruptcy estate is required to be turned over to the Trustee, regardless of who has possession thereof. *See* 11 U.S.C.A. § 542(a).

It is undisputed that the Debtor is not a party to the New Century Deed of Trust executed by Ms. Strelitz. While New Century Mortgage apparently relied upon the November 2000 Release in agreeing to make a loan to Ms. Strelitz, it is irrelevant to this Defendant whether the Release was actually recorded with the Sevier County Register of Deeds or not. The New Century Deed of Trust created a valid second mortgage on the Real Property, which was owned at the time by Ms. Strelitz. When Ms. Strelitz sold the Real Property to the Ocutos, she was entitled to use the proceeds to pay off the New Century Deed of Trust, as there is no requirement that she pay the first mortgage prior to paying the second. The consequences of not paying off the first mortgage, however, is that the lien survived, and the Real Property was sold subject to the Barzaly Deed of Trust.

The conveyance of the Real Property from Ms. Strelitz to the Ocutos did not extinguish this lien, since none of the sale proceeds were used to pay the Barzaly Deed of Trust, which the court has already determined was not released as to third parties without notice. Accordingly, at the time that the Debtor filed her bankruptcy petition, she held the first mortgage of record on the Real Property. This entitled the Trustee to execute against the Real Property if Ms. Strelitz failed to pay the indebtedness. The bankruptcy estate had no other interest in the Real Property, and thus, the fact that Ms. Strelitz's conveyance of the Real Property to the Ocutos occurred post-petition did not affect the Trustee's rights regarding the Real Property, in that she still maintained a right to execute upon the lien created by the Barzaly Deed of Trust. While the Trustee holds a lien on the Real Property, she has no interest in the sale proceeds paid to Wells Fargo, which were never property of the bankruptcy estate. She is not, therefore, entitled to a turnover of the proceeds paid to Wells Fargo pursuant to § 542(a).

## VI

In summary, the court finds that there are no genuine issues of material fact, and accordingly, the Trustee's Motion for Summary Judgment shall be granted in part and denied in part, with regards to the following: (1) the Barzaly Deed of Trust remains an enforceable lien against the Real Property such that the Trustee may foreclose upon the Real Property and apply any proceeds to the benefit of the estate to the extent that any indebtedness secured thereby exists and/or is unsatisfied; (2) the Recorded Release is invalid and did not release the Barzaly Deed of Trust; (3) the November 2000 Release, which has never been recorded, is insufficient to effectuate a release of the Barzaly Deed of Trust as to third parties without notice; (4) the Ocutos purchased the Real Property subject to the Barzaly Deed of Trust and the lien therefrom; and (5) the Trustee is not entitled to turnover of the proceeds paid to Wells Fargo after the post-petition conveyance of the Real Property from Ms. Strelitz to the Ocutos in satisfaction of its second mortgage on the Real Property.

Genuine issues of material fact exist with regards to whether the Barzaly Deed of Trust ever secured an actual indebtedness owed to the Debtor by Ms. Strelitz, and if so, whether all or any portion thereof remains unsatisfied. Accordingly, the Ocutos and Ms. Strelitz remain necessary parties to this cause of action. Wells Fargo, however, is not a necessary party, its Motion for Summary Judgment shall be granted, and the Complaint shall be dismissed as to this Defendant.

A order consistent with this Memorandum will be entered.

FILED: February 4, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33042

PAMELA LEE BARZALY  
f/d/b/a EMOTION ALLEY

Debtor

ANN MOSTOLLER, CHAPTER 7 TRUSTEE

Plaintiff

v.

Adv. Proc. No. 02-3197

WENDY STRELITZ, WELLS FARGO BANK  
MINNESOTA, NATIONAL ASSOCIATION,  
as Trustee, ALBERT P. OCUTO,  
GLORIA A. OCUTO, and  
PAMELA LEE BARZALY

Defendants

**ORDER**

For the reasons set forth in the Memorandum on Motions for Summary Judgment filed this date,  
the court directs the following:

1. The Motion for Summary Judgment filed by the Plaintiff, Ann Mostoller, Chapter 7 Trustee, on  
December 16, 2003, is GRANTED in part and DENIED in part as follows:

A. To the extent the Plaintiff seeks a summary judgment declaring the Deed of Trust dated  
January 12, 1999, between the Defendant Wendy Strelitz, as Grantor, and Timothy W. Jones,

Trustee, conveying the real property known as 524 Asa Street, Sevierville, Tennessee, to secure obligations owed to the Defendant Pamela Barzaly, of record in Trust Book 1081, page 117, in the Office of the Register of Deeds for Sevier County, Tennessee, to constitute a valid encumbrance, her Motion for Summary Judgment is GRANTED. The Plaintiff may enforce the lien of this Deed of Trust to the extent of any unsatisfied portion of the indebtedness secured thereunder.

B. To the extent the Plaintiff seeks a summary judgment declaring the November 3, 2000 Release executed by the Defendant Pamela Barzaly ineffective to release the lien of the January 12, 1999 Deed of Trust, the Motion for Summary Judgment is GRANTED. The November 3, 2000 Release, being unrecorded, is not effective as to the Plaintiff. Because the Release is ineffective pursuant to the Plaintiff's "strong-arm" powers under 11 U.S.C.A. § 544(a) (West 1993), it is not necessary for the Trustee to avoid it under 11 U.S.C.A. § 547(b) or § 548(a)(1) (West 1993 & Supp. 2003).

C. To the extent the Plaintiff seeks a summary judgment declaring the Release dated January 5, 1999, executed by the Defendant Wendy Strelitz ineffective to release the lien of the January 12, 1999 Deed of Trust, the Motion for Summary Judgment is GRANTED. This Release, being invalid, is not effective as to the Plaintiff to release the lien of the January 12, 1999 Deed of Trust. Because it is ineffective, it is not necessary for the Trustee to avoid it under 11 U.S.C.A. § 549 (West 1993 & Supp. 2003).

D. To the extent the Plaintiff seeks a summary judgment that the Defendants Albert P. Ocuto and Gloria A. Ocuto purchased the 524 Asa Street, Sevierville, Tennessee property from

the Defendant Wendy Strelitz on December 28, 2001, subject to the lien of the January 12, 1999 Deed of Trust, the Motion for Summary Judgment is GRANTED. The interest of the Ocutos in the 524 Asa Street, Sevierville, Tennessee property is subject to the lien of the January 12, 1999 Deed of Trust.

E. To the extent the Plaintiff seeks a determination that proceeds from the sale of 524 Asa Street, Sevierville, Tennessee, were ever property of the Debtor's bankruptcy estate, the Motion for Summary Judgment is DENIED. The proceeds were never a part of the Debtor's bankruptcy estate.

F. To the extent the Plaintiff seeks a turnover of funds in any amount from the Defendant Wells Fargo Bank Minnesota, National Association, the Motion for Summary Judgment is DENIED.

2. The Motion for Summary Judgment by Wells Fargo Bank, Minnesota filed by the Defendant Wells Fargo Bank Minnesota, National Association, on December 16, 2003, is GRANTED. Wells Fargo Bank Minnesota, National Association, is DISMISSED as a Defendant in this adversary proceeding.

3. The Motion for Summary Judgment filed by the Defendants Albert P. Ocuto and Gloria A. Ocuto on December 16, 2003, is, except as may have been granted in part herein by the disposition of identical issues raised by the Plaintiff's Motion for Summary Judgment, DENIED.

4. The following issues, as set forth in the December 5, 2003 Pretrial Order, present genuine issues of material fact which are the only remaining issues to be tried by the court:

A. Whether any debt owed by the Defendant Wendy Strelitz to the Debtor Pamela Lee Barzaly, if it ever existed, has been satisfied?



B. Whether, if any such debt has been satisfied, the Trustee is obligated to provide the Defendants Albert P. Ocuto and Gloria A. Ocuto with a release of the January 12, 1999 Deed of Trust and to pay the costs of recording the release?

SO ORDERED.

ENTER: February 4, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE